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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-97

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

RICHARD NEMITZ, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals (A. (II) 179-193)[1] is reported at 436 F.2d 841. The opinions of the District Court (A. (I) 19-36; 43-58) are reported at 287 F. Supp. 221 and 309 F. Supp. 575.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1971. The petition for a writ of certiorari was

[1] References in this form are to the printed appendix in this Court. The parenthetical numeral indicates the volume of the appendix in which the material referred to may be found.

filed March 15, 1971 and was granted May 24, 1971. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTE INVOLVED

This case presents a question of first impression in this Court concerning the proper interpretation and effect of the last sentence of Section 5(2)(f) of the Interstate Commerce Act (49 USC § 5(2)(f)). Section 5(2)(f) provides:

> "(f) As a condition of its approval, under this paragraph of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

QUESTIONS PRESENTED

1. Do the first two sentences of Section 5(2)(f) of the Interstate Commerce Act, dealing with the Interstate Commerce Commission's responsibility for the protection of railroad employees who may be adversely affected by a

railway consolidation, restrict the right of railway labor and management voluntarily to agree, both prior and subsequent to Commission approval of a railway consolidation, on the protection to be afforded such employees where the last sentence of Section 5(2)(f) states that they shall have this right "Notwithstanding any other provision of this Act. . . ."?

2. Where a collective bargaining agreement grants the employee's authorized collective bargaining representative discretion to decide whether or not to exhaust the grievance procedure, is the employee bound by the union's good faith determination that the grievance is without merit, or may the employee ignore the outcome of his union's administrative process and initiate judicial proceedings against the employer with regard to the same grievance?

STATEMENT OF THE CASE

Pre-Merger Negotiations

In 1961, an application was filed with the Interstate Commerce Commission (Commission) for approval of the merger of the Norfolk and Western Railway Company (N & W) with the New York, Chicago & St. Louis Railroad Company (Nickel Plate), the lease by the N & W of the Wabash Railroad Company, and the purchase by the N & W of the Sandusky Line of the Pennsylvania Railroad. Shortly thereafter, the Brotherhood of Railroad Trainmen (BRT) and other railroad labor organizations intervened in opposition to the application and for the purpose of securing protective benefits for adversely affected employees in the event of approval. With respect to protective benefits for employees, alternative approaches were available to the N & W and the intervening labor organizations. One approach would have involved full participation in adversary

proceedings before the Commission on that issue and ultimate submission of the question to the Commission for the prescription of protective conditions in the order approving the merger. An alternative was collective bargaining for the purpose of reaching agreement on protection for employees. The parties chose the latter course.

Prior to Commission approval of the merger, the N & W entered into a voluntary agreement with the Brotherhood of Railroad Trainmen (BRT) and other labor organizations, dated January 10, 1962, for the protection of employees who might be adversely affected by the merger (A. (I) 60-71). The agreement recited that it was made "pursuant to the provisions of the Railway Labor Act, as amended, and in accordance with the last sentence of Section 5(2)(f) of the Interstate Commerce Act . . ." (A. (I) 62). Section 1(d) of the agreement contained a provision for arbitration of disagreements concerning the proper interpretation or application of its provisions. That section provided that if a dispute arose which could not be settled between the BRT and the N & W within thirty days after it arose "the dispute may be referred by either party to an arbitration committee for consideration and determination" (A. (I) 65-66).

The substantive provisions of this agreement were not limited to the type of employee protection which Section 5(2)(f) requires when the Commission imposes conditions in its order of approval. When the protective benefits are prescribed by the Commission, an employee's pre-merger compensation must be protected from adverse effects attributable to the merger for a period of four years from the date of the merger or for the number of years during which the individual was employed prior to merger, whichever is less. There is no guarantee of employment and the protection flows only from the employing carrier.

This agreement of January 10, 1962 provided the basic benefits for the employees of the railroads involved in the transaction. The agreement went beyond the minimum protection of Section 5(2)(f) by providing for lifetime employment guarantee for all existing employees. Further, Section 1(a) made the provisions of the Washington Job Protection Agreement[2] applicable to the employees of all of the carriers involved in the various transactions, *"except as hereafter modified in Section 3"* (A. (I) 63). Section 2 extended the same protection to employees of the Wabash and certain other carriers *"except as provided in Section 3 hereof"* (A. (I) 66).

Section 3 covered employees of the Sandusky Line and provided as follows (A. (I) 67-68):

> "On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and *elect to accept such employment;* provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said

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[2] In 1936, most of the nation's railroads and labor organizations representing their employees entered into the Washington Job Protection Agreement. This Agreement, applicable to coordination or mergers of previously separate carrier facilities, affords income protection to adversely affected employees for a period of five years. The Agreement also provides for separation allowances and allowances to cover moving expenses. See *Railway Labor Assoc.* v. *United States,* 339 U.S. 142, 147-48 (1950).

employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that *Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition.* In the event any such employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that *Norfolk & Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.*

• • •

"It is further agreed that Section 1(d) herein, shall be applicable to the provisions contained in this Section" (emphasis added).

As a consequence of the qualifying clauses which appear in Sections 1 and 2 regarding the primacy of Section 3, the protection of employees of the Pennsylvania who elected to become N & W employees when the Sandusky Line was acquired was defined exclusively by the provisions of Section 3.

An examination of Sections 1, 2 and 3 of the January 10 Agreement shows that Pennsylvania employees who elected to become N & W employees on the acquisition date were accorded a type of protection which differed from that applicable to employees of other carriers covered by the Agreement. Employees covered by Sections 1 and 2 are guaranteed compensation equal to their full yearly earnings prior to consummation of merger, while the Pennsylvania employees, who had worked on the Sandusky Line, are guaranteed, by Section 3, compensation equal to their yearly earnings *on the Sandusky Line* prior to consummation of the merger. The reason for this difference is apparent when the nature of the transactions is considered.

In the case of the employees covered by Sections 1 and 2, all the lines of railroad on which these employees worked in previous years became part of the N & W as a result of the merger. The N & W, which had obtained the right to operate these lines, accordingly agreed to assume the burden of mitigating the effect of this acquisition upon the employees of these lines. The employees who worked on the Sandusky Line, however, were employees of the Pennsylvania Railroad for whom the Sandusky Line was only a portion of their working territory (A. (I) 7). These employees also worked on other portions of the Pennsylvania Railroad which were not acquired by the N & W. Operations on the Sandusky Line were manned by employees of the Pennsylvania who had the right to work anywhere on the Toledo Division of the Pennsylvania Road, including the Sandusky Line (A. (I) 7). These employees worked on the Sandusky Line when work was available, but had the right to work elsewhere on the Toledo Division during slack seasons or on other occasions when they chose to exercise their seniority rights for that purpose (A. (I) 7).

When the N & W acquired the Sandusky Line, it thus acquired only a portion of the working territory on which the Sandusky Line employees earned their living and, consequently, it could provide work for only a portion of those employees. The Pennsylvania Railroad, which retained the residue of the Sandusky Line employees' working territory, was in a position to provide work on this portion for the remaining Sandusky Line employees. In order to secure an allocation of employees to each line, consistent with the work opportunities remaining after the sale to N & W, the protection afforded to those electing N & W employment was limited to their Sandusky Line earnings (Noell Deposition, pp. 9, 12-13). It was expected that this limitation would make the N & W employment option attractive only for those with full-time earnings on the Sandusky Line and, thus, would result in an appropriate allocation of employees between the N & W and the Pennsylvania. Had the N & W agreed to protect all earnings on the entire Toledo Division, all Pennsylvania employees on the Toledo Division would have elected to become N & W employees on the Sandusky district.

By resolving the problem of employee protection through a voluntary agreement on this subject prior to Commission approval of the merger, the parties eliminated the necessity for the Commission to prescribe protective benefits for the employees covered by the agreement in its order approving the transaction. Thus, when the Commission approved the acquisition in 1964, its report merely recited the fact that employee representatives and the N & W had entered into an agreement for the protection of employees adversely affected by the transactions covered by its order. As to such employees, the Commission adopted the Examiner's conclusion that:

> "In view of the agreements mentioned, no conditions need be imposed under any authority granted herein

for the protection of those employees covered by such agreements." (324 ICC at 90)

The Commission did prescribe the traditional four-year income protection "for the benefit of employees not covered by such agreements . . ." (324 ICC at 50).[3]

Post-Merger Negotiations

Following approval by the Commission, the various transactions, including the acquisition of the Sandusky Line, were ultimately consummated on October 16, 1964.

---

[3] The following is a comparison of the protection afforded Sandusky Line employees under the 1962 agreement and the protection specified by Section 5(2)(f) of the Act governing Commission prescription:

	Section 5(2)(f)	*Agreement*
1. Burden of Proving Loss of Compensation Due to Merger	Burden on Employee	All Employees Deemed Adversely Affected
2. Period of Protection	4 years	Entire Working Lifetime
3. Extent of Protection	Full Earnings	Earnings on Sandusky Line
4. Source of Protection	Prior Employer (Pennsylvania)	N & W
5. Continuing Employment Rights.	Remain Employees of Pennsylvania; Continued Employment Dependent on Seniority and Available Work	Option to Become N & W Employee with Lifetime Employment Guarantee
6. Working Conditions	No Guarantee	Preserves Prior Working Rules

In furtherance of the protection agreement, all of the concerned employees were fully informed of the nature of the protection contained in Section 3 of the 1962 agreement and were required to make written election to become employees of the N & W before they became bound by the provisions of Section 3.[4] Despite this restriction, however, some employees who desired to live in Sandusky but had limited Sandusky Line earnings did make the election, after weighing the relative benefits of the agreement (including lifetime employment with N & W) against the restriction in earnings protection to prior earnings on the Sandusky Line, and perhaps in the hope that business over the Sandusky Line would increase under N & W ownership and operation (Noell Deposition, p. 18).

During the months immediately following the purchase of the Sandusky Line, the N & W and Brotherhood of Railroad Trainmen attempted to compute the protective benefits due the Pennsylvania employees who had elected to become N & W employees under the terms of Section 3 of the January 10, 1962 Agreement. The N & W was unable, however, to obtain from the Pennsylvania Railroad the Sandusky Line earnings of these employees in the twelve months prior to October 16, 1964 (Noell Deposition, p. 20). Although the Pennsylvania did provide data showing total earnings over the entire Toledo Division of the Pennsylvania, it did not furnish a breakdown for wages earned on the Sandusky Line alone (Yancey Deposition, pp. 33-35).

---

[4] The affirmative election required of Pennsylvania employees who had worked on the Sandusky Line was emphasized in a notice distributed to such employees under date of September 30, 1964 (A. (I) 153-59). The notice included a form with alternative elections, declining or accepting employment with the N & W. Section 3, quoted above, was attached to the form and was repeatedly emphasized as the source of any protective benefits for Pennsylvania employees electing to work for the N & W (A. (I) 153-59).

Because of the delay in payment of benefits and the other questions which arose subsequent to consummation, the Brotherhood of Railroad Trainmen sought to initiate arbitration under Section 1(d) of the 1962 Agreement in order to fix the rights of the parties under Section 3 (A. (I) 102-06). Before arbitration began, however, the parties reached agreement on these matters and entered into Implementing Agreement 1-A, and a separate letter of understanding, both dated October 25, 1965. The letter of understanding was designed to alleviate the immediate monetary needs of employees entitled to benefits under Section 3, in the absence of and until information was available as to the Sandusky Line earnings of former Pennsylvania Railroad employees. This letter, in relevant part, provided:

> "Thus far we have not received information as to earnings of these employees on the Sandusky Line during the 12 months period immediately preceding the effective date of the acquisition. We are advised that it will be several months before this information can be made available to the Norfolk and Western.
>
> "We are in receipt of a statement of the total earnings during the 12 months prior to October 16, 1964 from employment on the Pennsylvania Railroad of each of the employees who left the employment of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company October 16, 1964. Copy of that statement is enclosed herewith.
>
> "In order to start making protective allowances which may be due the employees involved under the January 10, 1962 Agreement, we are agreeable to setting up a temporary *'average monthly compensation' for each such employee, which shall be 75% of the total compensation earned by such employee on the Pennsylvania Railroad during the period October 16, 1963 through October 15, 1964, divided by 12.*
>
> • • •

> *"When information as to compensation earned on the Sandusky Line during the 12 months immediately preceding the date of acquisition is available, any underpayments made* for the period October 6, 1964 until the date the correct 'average monthly compensation' figures are available *will be adjusted and any overpayments made during that period will be withheld from the individual's current earnings or monthly displacement allowances, as the case may be,* in installments of $20.00 each month until the total of his overpayment has been withheld" (A. 89-91, emphasis added).

Implementing Agreement 1-A, which was also entered into on October 25, 1965, fully resolved the differences between the Brotherhood of Railroad Trainmen and the N & W with regard to Section 3 (A. (I) 85-88). Implementing Agreement 1-A implemented Section 3 as follows:

> (a) it deemed all former Sandusky Line employees as adversely affected within the meaning of Section 3;
>
> (b) it delineated the 12-month test period prior to the merger as October 16, 1963 through October 15, 1964, rather than some other period, e.g., a calendar-month period (October 1, 1963 through September 30, 1964);
>
> (c) it provided a formula for determining test period compensation for Brotherhood officers for time spent at conventions;
>
> (d) it provided a means for applying the "decline in volume of traffic or revenues" language of paragraph two, Section 3 of the January 10, 1962 Agreement.

With regard to calculating benefits for Sandusky Line employees, Implementing Agreement 1-A stated:

> "(b) For the purposes of Section 1 of the Memorandum of Understanding effective January 10, 1962, relative to construing the above-mentioned agreement for

> Protection of Employees, the 'test period' for employees covered hereby shall be the period October 16, 1963 - October 15, 1964, both dates inclusive. The *'Average Monthly Compensation' for employees covered hereby shall be arrived at by taking the total compensation received by the affected employee for service performed on the former Sandusky Line of Pennsylvania Railroad during the 'test period' and dividing by 12;* except that, if the affected employee comes within the category described in the second sentence of Section 3 of the above-mentioned Agreement for Protection of Employees the total compensation received for service performed on the former Sandusky Line of Pennsylvania Railroad by the Sandusky Line employee who caused the affected employee to be displaced during the 'test period' will be divided by 12 to determine the affected employee's 'average monthly compensation'" (A. (I) 85-86, emphasis added).

Following this disposition of the matter, certain dissident Sandusky Line employees complained to their union officials that the payments provided by the letter of understanding and Implementing Agreement 1-A were less than they had been originally entitled to under the January 10, 1962 Agreement. These employees contended that the 1962 Agreement should be construed to protect their pre-merger earnings over the entire Toledo Division of the Pennsylvania while Implementing Agreement 1-A limited protection to earnings on the Sandusky Line, which was only a portion of the Toledo Division. The BRT officials who were responsible for negotiating these agreements rejected those arguments on the ground that the dissident employees' interpretation of the January 10, 1962 Agreement was incorrect and that Implementing Agreement 1-A was fully consistent with the 1962 Agreement (A. (I) 148-50).

The dissident employees pursued their argument that Implementing Agreement 1-A violated the rights afforded

them by the January 10, 1962 Agreement and were afforded a full hearing before the BRT's National Board of Appeals on this matter. Before the union's Board of Appeals, the employees urged that Implementing Agreement 1-A was void as violative of their rights and that the question of the proper interpretation of the January 10, 1962 Agreement and the validity of Implementing Agreement 1-A should be taken to arbitration by the union pursuant to the provisions of Section 1(d) of the 1962 Agreement. The BRT's National Board of Appeals, its highest appellate body, concluded that the position taken by the dissident employees was without merit since their interpretation of the 1962 Agreement was clearly incorrect (A. (I) 148-50).

Proceedings In The Courts Below

The dissident employees thereupon instituted the present litigation, seeking damages for breach of the 1962 Agreement on the theory that the provisions of that agreement had been incorporated in the Commission's 1964 order approving the merger and that the interpretation of that agreement by their own union constituted a violation of the Commission's order. N & W filed a motion to dismiss this complaint on the ground that the arbitration procedures of the 1962 Agreement or, alternatively, the procedures available under Section 3 of the Railway Labor Act (45 U.S.C. Sec. 153) for resolving disputes over the interpretation of collective bargaining agreements provided exclusive remedies for plaintiffs and barred this action. The district court denied this motion, holding that the employees' unsuccessful request to the union to invoke arbitration was a sufficient exhaustion of the arbitration procedures of the agreement (A. (I) 34). The court further held, on the theory that the suit was not one to enforce a collective bargaining agreement but to enforce the Commission order approving the acquisition of the Sandusky

Line, that the procedures of the Railway Labor Act were inapplicable. This conclusion resulted from the court's view that Section 5(2)(f) both permitted and required the Commission to prescribe protective conditions for employees already covered by a voluntary protective agreement.

Following the denial of its motion to dismiss, N & W moved for summary judgment, relying on Implementing Agreement 1-A which was before the district court for the first time. N & W contended that Implementing Agreement 1-A was the document from which respondents' rights must flow since it represented the most recent agreement between the N & W and the employees' collective bargaining representative on this subject and since it was authorized under the last sentence of Section 5(2)(f). N & W further contended that since Implementing Agreement 1-A was entered into subsequent to Commission approval of the purchase it was independent of any Commission Order and thereby subject to the exclusive arbitration procedures of the agreement or of the Railway Labor Act.

The district court denied this motion (A. (I) 43-58; 309 F. Supp. 575). The court held that the last sentence of 5(2)(f) outlawed agreements subsequent to Commission approval which deviated from the conditions which the parties had originally agreed upon and which, in its view, had been imposed by the Commission. The court further concluded that Section 5(2)(f) also prohibited any agreement which did not provide all employees involved with the benefits which are described in the second sentence of 5(2)(f). Finally, the court concluded that it was authorized to interpret the Commission order, the January 10, 1962 Agreement, Implementing Agreement 1-A and the requirements of the second sentence of 5(2)(f) as they applied to respondents and to determine from this inter-

pretation whether Implementing Agreement 1-A met what, in the court's view, were the requirements for a valid agreement under the last sentence of 5(2)(f) and whether the effect of Implementing Agreement 1-A on the employees involved was "benign". The court concluded that Implementing Agreement 1-A did not meet these requirements and held it void (A. (I) 56).

In the same opinion, the district court resolved the cross-motion for summary judgment which had been filed by the respondents. The court construed the January 10, 1962 Agreement in accordance with respondents' view, thereby rejecting the contrary interpretation of that agreement by the BRT and the N & W, the parties who had negotiated and signed it. The court issued a declaratory order with regard to the meaning of the January 10, 1962 Agreement and ordered the parties to submit the question of the damages due the dissident employees to arbitration under Section 1(d) (A. (I) 58).

On appeal, the Court of Appeals adopted and adhered to the district court's view of the law. The court held that Section 5(2)(f) must be read "as imposing upon the I.C.C. the duty to make provisions for the protection of affected employees" and that "the existence of a prior agreement does not allow the I.C.C. to ignore its statutory duty" (A. (II) 185). The court concluded that "the rights set forth in the 1962 Agreement were incorporated in the 1964 order and for purposes of federal court jurisdiction stem from such order" (A. (II) 186).[5] Implementing Agree-

[5] The Court of Appeals sought to support this conclusion by referring to the N & W's answer in this case and a stipulation filed with the Commission by the parties to the 1962 Agreement (A. (II) 184). The N & W answer and the stipulation relied on by the Court of Appeals do not support the conclusion that the Commission's order prescribed the protective benefits in question. For

ment 1-A, the court held, "abridged rights previously vested in appellees by virtue of the ICC order" and "is contrary to the policy of the Act" (A. (II) 188-89). With respect to arbitration, the court announced that the arbitration clause was permissive, that the dissident employees were not bound by their union's determination that their claims were without merit, and could seek judicial relief since any effort "to proceed with further administrative remedies would be futile" (A. (II) 192).[6] The court below acknowledged that its decision was in conflict with *Bonnot* v. *Congress of Independent Union, Local #14,* 331 F.2d 355 (8th Cir. 1964), regarding the nature of the obligation imposed by the arbitration clause.

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example, the stipulation provided that "should the Interstate Commerce Commission approve the pending applications . . . the provisions of the agreement . . . shall be applied for the protection of the interests of employees of the carriers involved . . ., as required by Section 5(2)(f) of the Interstate Commerce Act and any report and order issued by the Commission . . . may so state" (A. (I) 80). This stipulation thus recognized that the protection flows from the agreement and that the Commission's order may recite this fact. The parties thus stipulated that the agreement, not the Commission's order, provided the protection required by Section 5(2)(f) and that the Commission might properly acknowledge this.

In any event, the court's subject matter jurisdiction depends on the validity of this conclusion, and the admissions of the parties cannot establish it. *King Bridge Co.* v. *Otoe County,* 120 U.S. 225, 226 (1887); *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6, 17-18 (1951). The admissions relied on by the Court of Appeals also involve conclusions of law which, unlike allegations of fact, are not deemed admitted by the answer. Vom Baur, *Federal Administrative Law* Vol. 1, Sec. 444; *Peters* v. *Hobby,* 349 U.S. 331 (1955); *Cole* v. *Young,* 351 U.S. 536, 551-58 (1956).

[6] The Court of Appeals determined, however, that the question of damages should also be resolved by the district court rather than through arbitration and remanded the case for this purpose (A. (II) 193).

The net result of the decision below is to give the dissident employees the best of both worlds. The major respects in which the protection provided by the agreements exceeds that which would have been prescribed by the Commission remain undisturbed (the opportunity to become N & W employees, lifetime employment guarantee, no need to change residence, compensation guarantee of unlimited duration, etc.). These benefits were negotiated for respondents by the BRT as part of an agreement pursuant to which the compensation guarantee was limited to Sandusky Line earnings. As a result of the decision below, this limitation has been invalidated while the other features of the agreement remain unaffected. The court below has thus rewritten the agreement, contrary to the position of both the union and the railroad, to give to the dissident employees the best of the protection which the Commission is required to prescribe plus the best of the agreement which the BRT negotiated on their behalf in lieu of Commission-prescribed protection.

SUMMARY OF ARGUMENT

1. The basic and pervasive errors of the decisions below involve their allocation of responsibility for employee protection in connection with transactions subject to Section 5(2)(f) of the Interstate Commerce Act. Although the statutory language, legislative history and administrative interpretation clearly support primary reliance on the traditional process of collective bargaining, the lower courts have decided that the basic and fundamental roles should instead be assumed by the judiciary and the Interstate Commerce Commission.

The lower courts justified their departure from traditional labor policy by construing Section 5(2)(f) of the Interstate Commerce Act in a manner which requires the

courts and the Interstate Commerce Commission to oversee the collective bargaining process. Since the results of this interpretation of Section 5(2)(f) are so clearly contrary to established principles and policy, such an interpretation could only be justified if it were clearly required by the statutory language and legislative history. The fact is, however, that the lower courts' interpretation of the statute is clearly contrary to both. The last sentence of Section 5(2)(f) specifically provides that "any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees" may enter into agreements for employee protection, "notwithstanding any other provisions of this Act".

In the context of the statute, the only purpose which this language could possibly serve is to make certain that the provisions of Section 5(2)(f), dealing with the Commission's duty to prescribe protection and the substance of the protection which the Commission may prescribe, do not limit the authority of labor and management to agree on the protection to be afforded affected employees. This interpretation is confirmed by the legislative history of the Section.

The courts below nevertheless concluded that the Interstate Commerce Commission is required to prescribe protection for employees when approving mergers despite the existence of a comprehensive prior agreement between labor and management on this subject. In reaching this holding, which requires the Commission to retroactively evaluate the efforts of the employees' collective bargaining representative, the lower courts rejected the Commission's own view of its authority in the premises.

2. On the basis of this erroneous interpretation of the statute, the lower courts assumed jurisdiction (a) to deter-

mine whether a voluntary post-merger agreement is consistent with Section 5(2)(f) of the Interstate Commerce Act, and (b) to construe a voluntary railway labor agreement, entered into prior to and in contemplation of a railroad merger for the purpose of establishing protective benefits for employees who might be adversely affected.

A. Each of the holdings below reflects the view that the judiciary and the Commission can and should involve themselves in day-to-day labor problems for the purpose of determining whether the outcome of the collective bargaining process meets what the courts and the Commission determine to be in the best interests of the employees. This view is contrary to established labor policy as that policy has been implemented by Congress and the courts and will, if allowed to prevail, have serious adverse effects on the stability of labor relations in the railroad industry.

The decisions below interpose governmental agencies as third parties at the bargaining table with final authority to dictate the conditions of employment regardless of the wishes of labor and management. This imposition of governmental authority decreases both the likelihood that agreements will be reached with a minimum of strife and economic disruption and the likelihood that those affected by the terms of the agreement will be satisfied with the results achieved.

The courts below also failed to recognize that the protection which respondents received through the efforts of their collective bargaining representative was far superior to that which the Commission would have prescribed had the union not sought and achieved a voluntary agreement with N & W. The fact is that what respondents seek here is not the protection that they would have received from the Commission absent a voluntary agreement. Instead,

they seek to retain the benefits obtained for them by their union through voluntary agreement and to obtain additional protection which is neither provided for in the agreement or required by the Act.

B. The courts below construed the initial employee protection agreement in a manner contrary to the construction of that agreement by both of the parties who had negotiated it. On the basis of this construction of the pre-merger agreement, the lower courts invalidated the subsequent agreement, which had been negotiated and executed by the employees' authorized collective bargaining representative, on the ground that in the courts' view the agreement deprived the employees of benefits to which they were entitled.

3. In addition to eliminating the right of the parties to determine working conditions for themselves, the decisions below also permit the courts to interpret the results of the collective bargaining process despite the fact that the parties have agreed upon a grievance procedure designed to insure that such decisions are made by the parties themselves or by arbitrators who have a thorough understanding of the context in which the agreements operate. This Court has on several occasions recognized the importance and desirability of having industrial grievances resolved by expert arbitrators, emphasizing that "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in a collective bargaining agreement" and that "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed" (*Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960)). In the area of railway labor relations, Congress has given explicit recognition to the desirability of arbitration of grievances by making arbitration mandatory and prohibiting judicial consideration of griev-

ances. In addition, the Interstate Commerce Commission has consistently prescribed arbitration as the method for resolving disputes concerning the interpretation of protective provisions which it prescribes. The courts below ignored the considered judgment of this Court, Congress, the Interstate Commerce Commission, and railway labor and management in assuming responsibility to interpret the collective bargaining agreements involved here.

The lower courts' decision that respondents here are not bound by their authorized representative's good faith decision not to exhaust the agreed-upon administrative procedure for resolving this dispute is directly contrary to this Court's determination of the same question. In *Vaca* v. *Sipes*, 386 U.S. 171 (1967), this Court specifically held that the need to permit organized labor and management to create an administrative system which promotes union prestige, quickly disposes of frivolous grievances, treats similar complaints consistently, and permits the parties to permanently resolve major problems requires the opposite result.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF SECTION 5(2)(f) OF THE INTERSTATE COMMERCE ACT, UPON WHICH JURISDICTION IN THIS CASE IS PREDICATED, ERRONEOUSLY TRANSFERS TO THE COMMISSION AND THE COURTS THE COLLECTIVE BARGAINING RIGHTS AND RESPONSIBILITIES WHICH THE STATUTE ASSIGNS TO THE REPRESENTATIVES OF LABOR AND MANAGEMENT.

In both the district court and the Court of Appeals, N & W argued that respondents' rights were based on the 1962 Agreement and Implementing Agreement 1-A and

that the courts lacked jurisdiction to resolve a dispute over the interpretation of railway labor agreements such as these. Both courts concluded that the present action was one to enforce an order of the Interstate Commerce Commission rather than to enforce a railway labor agreement. The basis of this conclusion is found in two holdings of the Court of Appeals with regard to the proper interpretation of Section 5(2)(f) of the Interstate Commerce Act. First, the court held that the 1962 Agreement was incorporated in the Commission's order granting authority for the merger because despite the "existence of a prior agreement . . . the ICC is required . . . to impose employee protective conditions. . . ." (A. (II) 185). Second, the court held that Implementing Agreement 1-A is void because, in the court's view, "the subsequent agreement abridged rights previously vested in the appellees by virtue of the ICC order" and is "contrary to the policy of the Act as embodied in the second sentence of 5(2)(f)" (A. (II) 188-89). The court thus concluded that, despite the contrary language and legislative history of the last sentence of Section 5(2)(f), the duty of the Interstate Commerce Commission, under the first two sentences of Section 5(2)(f), with regard to protection of railway employees who may be adversely affected by railway mergers, severely restricts the right of labor and management to agree on protection for such employees and to arrive at mutually desirable arrangements which vary from the benefits described in the statute.

The last sentence of Section 5(2)(f) provides:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

In the context of the statute, the only purpose which this language could possibly serve is to make certain that the provisions of Section 5(2)(f), dealing with the Commission's duty to prescribe protection and the substance of the protection which the Commission may prescribe, do not limit the authority of labor and management to agree on the protection to be afforded affected employees. The propriety of this interpretation is confirmed by the legislative history of the Section.

Despite the language of the statute and its legislative history, the Court of Appeals concluded that (1) a voluntary pre-merger agreement is subject to review by the Commission and must conform to the requirements for prescription of employee protection applicable to the Commission, since the Commission must prescribe employee protection despite the existence of a voluntary, extensive and detailed pre-merger agreement dealing with that subject; and (2) a post-merger voluntary agreement is void unless it is fully consistent with the terms prescribed by the Commission and with the requirements applicable to Commission-prescribed conditions, or unless a Court, retroactively evaluating the agreement, concludes that it does not abrogate what the Court deems to be the employees' rights under previous agreements and Commission orders. Thus, a voluntary agreement prior to Commission approval is relegated to the position of a suggestion to the Commission as to how it should exercise its responsibilities under Section 5(2)(f) and a subsequent agreement is permisssible only if it deals with ministerial questions or grants employees additional benefits without any concessions on their part. As the following discussion will show, this approach to collective bargaining agreements dealing with employee protection is palpably erroneous.

A. Legislative History and Other Expressions Of Congressional Policy.

An analysis of the legislative history of Section 5(2)(f) reveals that Congress intended, by the last sentence of that Section, to insure that Section 5(2)(f) would not be construed to restrict the right of labor and management to determine protective conditions by voluntary agreement. This history reveals that the lower courts, by failing to honor the literal language of the Section, have attributed the very meaning to Section 5(2)(f) which Congress sought to avoid by including the last sentence.

The history of the merger provisions of the Interstate Commerce Act has been discussed by this Court on several occasions. *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 315-321 (1954); *Railway Labor Assn.* v. *United States*, 339 U.S. 142 (1950); *United States* v. *Lowden*, 308 U.S. 225 (1939). These cases show that the genesis of these provisions was the report of the "Committee of Six", composed of three representatives of railroad management and three representatives of railway labor, appointed by President Roosevelt to study the problem of railroad mergers. This Committee recommended that the Interstate Commerce Act be amended to permit railroad mergers pursuant to voluntary agreements by the individual railroads involved, subject to the requirement of approval by the Interstate Commerce Commission. This recommendation contrasted with the previous law which permitted voluntary mergers only in accordance with a prescribed national plan devised by the Interstate Commerce Commission under which very few mergers had been consummated (*Railway Labor Assoc.* v. *United States*, 339 U.S. 142, 146-49 (1950)). It also contrasted with a suggestion by the Interstate Commerce Commission that a law providing for compulsory mergers be adopted. Thus, Section

5 was conceived by railway labor and management as a means of facilitating railroad mergers by permitting such mergers on terms voluntarily agreed upon by the parties rather than imposed by the Interstate Commerce Commission.

One of the most influential individuals in shaping the language of Section 5 of the Act was George M. Harrison, a member of the Committee of Six and head of the Railway Labor Executives Association, which at the time represented over 90 percent of the railway employees. Mr. Harrison testified before the House Committee as the official spokesman for the Committee of Six with regard to a bill sponsored by the Interstate Commerce Commission at a time when the Committee of Six bill was still being drafted and had not yet been introduced.[7] Mr. Harrison first spoke in opposition to the Commission bill, particularly certain provisions which would have authorized the Commission to override voluntary collective bargaining agreements in approving mergers. (Hearings before the House Committee on Interstate and Foreign Commerce on the Omnibus Transportation Bill, 76th Cong., 1st Sess., 215-16 (1939)).

Mr. Harrison then discussed the approach to employee protection which was favored by the Committee of Six, stating (id., pp. 216-17):

> "Now, the existing situation is this: In 1936, in the spring of that year, we made an agreement [Washington Job Protection Agreement] with about 85 percent of the mileage of the country providing a schedule of benefits for workers that might be affected by coordi-

[7] *In Railway Labor Assn.* v. *United States, supra,* 339 U.S. at 149 (fn. 11), in discussing Section 5(2)(f), this Court stated:

> "As this provision was derived from the recommendation of the Committee of Six, the testimony of George M. Harrison, a member of that Committee, throws light upon its meaning."

nations or mergers. That agreement has now been in operation for about 3 years and it has worked out very satisfactorily. It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection.

"*Well you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 percent of the mileage of the country refuses to come into the agreement.* You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made.

"Now, the exact formula of that, of course, I am not here prepared to suggest, but at least *we have solved that problem through collective bargaining, with the management and if we could get all of the roads into the agreement we would not even suggest any protection as a matter of law.*

"Our Railway Labor Executives' Association representing substantially all of the railway workers, have endorsed this report, because they think it is a genuine approach to this problem so far as governmental action can be undertaken. They have not, as yet, taken any specific action on the matter or the extent of the protection that should be sought, if any, other than those prescribed in the collective agreement made by about 85 percent of the mileage of the country during May 1936.

"So, I want to leave that open before this Committee until our group can consider specifically that matter, but generally I think we have solved it through that

agreement, if we can reach the 15 percent of the mileage that has not subscribed to the agreement up to this time." (Emphasis added)

Mr. Harrison, having made the point that imposed protection was only necessary where voluntary agreements have not been reached, went on to discuss the general type of employee protection provision he would favor. In discussing this subject, he clearly indicated that nothing in the new law should impose rigid terms which would prevent the voluntary negotiation of protective conditions that were either more or less favorable to employee interests than the provisions of the Washington Job Protection Agreement (id. pp. 243-44):

"*The Chairman:* Your idea, I take it, would be to continue in substance the existing agreement rather than reach out for more favorable provisions?

"*Harrison:* Well, it would give the Transportation Board a guide as to what it should do and it would impose on the Board the duty of providing those protections.

"Now, as it is generally applicable, I presume the agreement would settle that, because it is generally applicable.

"*It would permit an elastic arrangement whereby should we subsequently revise the agreement, either less or more favorably, then those conditions would be generally applicable. In other words, you would not make a rigid arrangement and at the same time you would provide for protection.*" (Emphasis added)

Certainly there can be no doubt regarding the objectives of the Committee of Six and the interests it represented with respect to employee protection. Labor and management sought legislation which would preserve the flexibility inherent in voluntary agreement as to protection require-

ments while, at the same time, providing a means by which the Commission could require protection from carriers who were unwilling to make such agreements.

The House Committee ultimately reported out the Committee of Six bill with a favorable recommendation. As the spokesman for the Committee of Six had urged, the bill provided that the Commission, as a prerequisite to approval of a merger, shall require a fair and equitable arrangement for the protection of employees. It was assumed that under this general provision the Commission would adopt the provisions of the Washington Job Protection Agreement as the "fair and equitable arrangement" described in the statute (id. p. 1291). In this manner, the substantive terms of employee protection would evolve from the process of collective bargaining as embodied in that agreement, a goal which Mr. Harrison had repeatedly stressed in his testimony before the Congressional Committees.

The only labor opposition to this approach came from the Brotherhood of Railroad Trainmen, which was not a member of RLEA at that time. Spokesmen for that organization insisted, in testimony before the House Committee, that more precise standards should govern the Commission in its prescription of protective conditions for employees (id. p. 1291). Although this view was not adopted by the House Committee, Representative Harrington successfully sought to achieve this purpose on the House floor by amending the employee protective provision of the House bill to include the following proviso (84 Cong. Rec. Pt. 9, 9882 (1939)):

> "Provided, however, that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."

The bill went to conference with the Harrington Amendment. While in conference, much opposition to the Harrington Amendment arose. Recognizing that the Harrington Amendment removed any possibility that the new bill would promote mergers, the conference committee eliminated from the bill all amendments to the merger Section of the Act. When the bill reached the House floor again, however, Congressman Harrington and others proposed to recommit the bill to conference with instructions to reinclude the merger provisions in the bill and to insist upon the following provision for employee protection (86 Cong. Rec. Pt. 6, 5886 (1940)):

> "As a prerequisite to its approval of any consolidation, merger, purchase, lease operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section in respect to carrier by railroad subject to the provisions of part I, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in worse position with respect to their employment.
>
> "Notwithstanding any other provision of this Act, agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

This provision relating to employee protection was intended to accomplish the BRT purpose to impose specific standards governing the Commission in its prescription of

protective conditions and to provide also for the alternative of voluntary agreement regarding such conditions, the objective of the Committee of Six. The final sentence of Section 5(2)(f), encompassing the alternative collective bargaining approach to employee protection, thus appeared for the first time in the motion to recommit. Predictably, Congressman Harrington was the chief proponent of the motion to recommit. In his principal speech on this subject he explained the provisions which he sought to instruct the House conferees to insist upon in conference, stating (86 Cong. Rec. Pt. 6, 5871 (1940)):

> *"The proposed labor clause sets up specific legislative standards for the Interstate Commerce Commission to follow,* instead of permitting the Commission to exercise a free and easy discretion as to what is in the public interest. By the adoption of this provision in the transportation bill, the Government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers. *But this provision also contains a clause that permits the industry, through the processes of collective bargaining, to work out its problems in a democratic manner."* (Emphasis added)

Thus, the strongest Congressional advocate of compulsory employee protection clearly expressed his view that the language provided legislative standards for the Interstate Commerce Commission to follow, but only where the parties did not resolve employee protection problems through a collective bargaining agreement.

The motion to recommit was passed and the bill was sent back to conference. The conference committee then reported out Section 5(2)(f) in its present form. The section was identical to the House recommendation on recommitment except that it placed a four-year time limit on the protection which the Commission was required to prescribe

in the absence of an Agreement. The last sentence remained in the Section without change.

When the revised bill was returned to the House, the principal speaker in support of it was Congressman Wolverton, who was a member of the House committee which had originally held hearings on the bill and also a House conferee on the legislation. In discussing the differences between the House committee members who had reported out the original Committee of Six bill and the Congressmen who had supported the original Harrington Amendment, Congressman Wolverton stated (86 Cong. Rec. Pt. 9, 10189 (1940)):

> "Now, as to the Harrington amendment, the conferees have adopted practically the same language as originally adopted by the House, but with a modification as to the length of time the provisions are to be effective. This amendment, as you are all possibly aware, was not in the Senate bill in any form whatsoever. Objection was made that the amendment, in the language adopted by the House, would guarantee for life the employment of any and all employees of railroads participating in a consolidation or merger of their lines even though the employee's service may have been as little as a month, or even less; and, furthermore, if there was no work for them as a result of the consolidation or merger, yet their compensation would continue upon the same basis as at the time of consolidation and until death or their voluntary separation from the service of the company.
>
> "In fact there were some who were of the opinion that it froze every job for the employee in service at the time of consolidation but also froze perpetually every job which existed at the time of the consolidation or merger. So, even death or resignation of the employee did not end the job. It would descend to someone else even though not in the employ of the railroad at the time of the consolidation or merger. And,

then *there was also further uncertainty in the opinion of some representatives of railroad labor as to whether the language of the amendment might not preclude voluntary agreements, between management and men by collective bargaining, from being entered into.*

"I want, however, to make it clear that no one who expressed the opinions I have mentioned thought for a moment that any of these possibilities were ever intended by the sponsors of the amendment.

* * *

". . . Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment. In fact the provision contained in the original bill had the approval of 20 out of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation be left out of the bill and the matter be left at this time as a matter for collective bargaining." (Emphasis added)

This language fixes beyond doubt both the genesis and purpose of the last sentence of Section 5(2)(f). It represents an addition to the Harrington Amendment, added to allay the fears of union leaders who supported the Committee of Six bill and who felt that the Harrington Amendment might be construed to preclude voluntary agreement on employee protection. As such, its purpose was to insure that nothing in Section 5(2)(f) or in any other provision of the Act would operate to impair such agreements.

In summary, the legislative history of the merger Section of the Interstate Commerce Act reveals that the principal spokesman for every group that was active in the drafting and planning of Section 5(2)(f) was on record as opposing a provision for employee protection which would provide for rigid government-dictated protection in every merger,

and would preclude voluntary agreement between carriers and railway unions on protective benefits. The legislative history also shows that the last sentence of Section 5(2)(f) was specifically designed to insure that Section 5(2)(f) would not be construed to limit voluntary agreement on protective benefits.

In the face of this overwhelming evidence of the purpose and meaning of Section 5(2)(f), the courts below construed that Section to severely limit the ability of unions and carriers to make effective agreements with regard to employee protection and to require the Interstate Commerce Commission to impose protective conditions in every merger in accordance with the rigid standards of Section 5(2)(f). The lower courts achieved this result by ignoring the literal language of the last sentence of Section 5(2)(f) and without any discussion of the pertinent legislative history. As a consequence of this failure to consider or discuss the pertinent legislative history, the decisions below attribute a meaning to Section 5(2)(f) which requires the very result which Congress clearly intended to prohibit.

It is clear, therefore, that the decisions below will frustrate congressional policy regarding the proper role of collective bargaining in rail unifications. The decision forces labor and management to act as adversaries before the Commission, even though they are agreed on employee protection, because of the possibility the Commission will alter such protection and discourages unions from entering into voluntary agreements either before or after mergers because of the possibility of retrospective criticism when the Commission or a Court reviews the agreement. The decision below would also frustrate voluntary agreements because the unions would be barred from making any concessions as to some aspects of protection in order to achieve goals desired by the employees in other areas.

The Court of Appeals' interpretation of Section 5(2)(f) is also in conflict with fundamental congressional policy in the area of railway labor relations, as evidenced by the basic purpose and provisions of the Railway Labor Act. As this Court has held, the governing purpose of the Railway Labor Act is to promote "the efficient discharge by the carriers of their important functions with a minimum disruption from labor strife". *International Machinists* v. *Street*, 367 U.S. 740, 755 (1961). In *Street*, this Court made it clear that the Railway Labor Act constituted a basic congressional decision that the goal of stable railway labor relations could best be achieved by promoting voluntary agreement in contrast to imposition of employment conditions by government fiat (367 U.S. at 760). Summarizing federal railway labor policy, this Court stated (367 U.S. at 757-58):

> "Congress has . . . consistently adhered to a regulatory policy which places the responsibility squarely upon the carriers and the unions mutually to work out settlements of all aspects of the labor relationship."

Last term, this Court took occasion to emphasize again the congressional purpose in railway labor matters to leave the formulation of substantive employment conditions to the traditional collective bargaining process. Thus, in *Chicago & N.W.R.Co.* v. *Transportation Union*, ___ U.S. ___ (decided June 1, 1971), this Court defined the bargaining obligations of the parties under Section 2, First, of the Railway Labor Act with particular regard to "the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements" (Slip Opinion, fn. 11, pp. 8-9).

This emphasis on voluntary agreement has been the keynote of all federal regulation of labor relations. In *Team-*

sters Union v. *Oliver,* 358 U.S. 283, 295 (1959) for example, this Court stated:

> "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Act, is the promotion of collective bargaining to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations and thereby to minimize industrial strife. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed."

The Court of Appeals has concluded, however, that Congress, in enacting Section 5(2)(f), intended to place severe restrictions on the ability of labor and management to enter into voluntary agreements in merger situations and to vest in the Interstate Commerce Commission and the Courts the duty of supervising the outcome of the collective bargaining process. The language of Section 5(2)(f), particularly when considered in light of its enactment shortly after the 1934 revision of the Railway Labor Act and that it was the result of the same process of compromise between labor and management which led to enactment of the Railway Labor Act, demonstrates that the conclusion of the Court of Appeals that Section 5(2)(f) restricts voluntary agreement is clearly in error.

B. The Consistent And Long-standing Administrative Interpretation of Section 5(2)(f) Of The Interstate Commerce Act.

In a long line of opinions, the Interstate Commerce Commission has consistently expressed the view that, under the Act, a voluntary agreement for the protection of railroad employees, made prior to its approval of a merger, removes the necessity for and authority of the Commission to pre-

scribe protective conditions. In *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 ICC 475, 544 (1966), the Commission stated:

> "The last sentence of Section 5(2)(f) of the act provides that, notwithstanding any other provisions of the act, employee protection may be established by agreement between a railroad and the unions representing its employees. Consequently, except to find, as we do, that the agreement of May 20, 1964 does not render the proposed transaction inconsistent with the public interest, we can make no requirement as to the protection of employees covered by the agreement."

In *Great Northern Pac. & B. Lines Merger—Great Northern*, 331 ICC 228, 279 (1967), the Commission, in speaking of voluntary protective agreements, stated:

> "Under the terms of the last sentence of Section 5(2)(f), the entering into such agreements takes from us the obligation of providing protection for employees covered thereby. As to them, therefore, we make no requirement for protection, but do find the agreement does not render the proposed transaction inconsistent with the public interest."

Accord: *Chicago & N. W. Ry. Co. Purchase, Minneapolis & St. L. Ry. Co.*, 312 ICC 285, 296 (1960), *Duluth, S.S. & A.R. Co. Merger*, 312 ICC 341, 356-57 (1960); *Norfolk & Western Railway Co. Merger, Etc., Virginian Railway Co.*, 307 ICC 401, 439 (1959).

Indeed, in the very merger which is involved in this case, the Commission expressly adopted (324 ICC at 9) the Examiner's conclusion that (324 ICC at 90):

> "In view of the [1962] agreements mentioned no conditions need be imposed under any authority granted herein for the protection of those employees covered by such agreements."

This administrative construction of the statute is entitled to controlling weight. As this Court held in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965):

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n.* v. *Aragon*, 329 U.S. 143, 153."

Red Lion Broadcasting Co. v. *F.C.C.*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *."). *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970); *Rosado* v. *Wyman*, 397 U.S. 397, 414 (1970); *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965); *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549 (1940); *Gulf Oil Corp.* v. *Hickel*, 435 F.2d 440, 444-445 (D.C. Cir. 1970); *Board* v. *Hearst Publications*, 322 U.S. 111, 130-131 (1944); *Levison* v. *Spector Motor Co.*, 330 U.S. 649, 662 (1947); *ICC* v. *Memphis Union Station*, 360 F.2d 44, 50 (6th Cir. 1966), cert. den. 385 U.S. 830 (1966).

To conclude this point, it is clear that the lower courts erred in holding that Section 5(2)(f) requires the Commission to prescribe protective conditions where the parties to a transaction have entered into a voluntary agreement for employee protection. Since this erroneous conclusion was the predicate for the jurisdictional determination that respondents' rights derive from an order of the Commis-

sion, the decision below should be reversed with directions to dismiss for lack of jurisdiction.

II. THE HOLDING OF THE COURTS BELOW THAT IMPLEMENTING AGREEMENT 1-A IS VOID AND UNENFORCEABLE IS CLEARLY ERRONEOUS.

As shown in the statement of the case, the Brotherhood of Railroad Trainmen, as the authorized representative of respondents and other N & W employees, entered into Implementing Agreement 1-A on October 25, 1965, more than a year after Commission approval of the purchase of the Sandusky Line. It is undisputed that Implementing Agreement 1-A establishes a formula for computing the benefits to which Sandusky Line employees are entitled, based on the Sandusky Line earnings of such employees in the year prior to the acquisition. In this regard, the Agreement states:

> "The 'Average Monthly Compensation' for employees covered hereby shall be arrived at by taking the total *compensation received* by the affected employee *for service performed on the former Sandusky Line* of Pennsylvania Railroad during the 'test period' and dividing by 12 . . ." (A. (I) 85-86).

Because Implementing Agreement 1-A clearly establishes that respondents are not entitled to the benefits they seek in this action, respondents were forced to argue in the lower courts that, although the agreement was entered into on their behalf by their authorized collective bargaining representatives as a means of resolving all disputes with regard to the meaning of Section 3 of the January 10, 1962 Agreement, they are free to ignore it and to proceed as though it did not exist.

The lower courts, in accepting respondents' argument in this regard, concluded that the last sentence of Section

5(2)(f) does not permit the parties to reach agreements subsequent to Commission approval which deviate from the conditions which the parties had originally agreed upon and which, in the courts' view, had been imposed by the Commission. The courts below further concluded that Section 5(2)(f) also prohibits any agreement which provides employees with benefits that the court determines to be less desirable than those described in the second sentence of Section 5(2)(f). Pursuant to these conclusions, the courts below undertook to interpret the January 10, 1962 Agreement, Implementing Agreement 1-A and the requirements of the second sentence of Section 5(2)(f) as they applied to respondents to determine whether Implementing Agreement 1-A "abridged" or "abrogated" any of the protective benefits of the 1962 agreement and whether the agreement met what the courts regarded as the requirements for a valid agreement under the last sentence of Section 5(2)(f). The lower courts concluded that Implementing Agreement 1-A did not meet these requirements and consequently declared it to be void (A. (I) 54-56, (II) 188-89). These conclusions are clearly contrary to the statute.

A. Implementing Agreement 1-A Is Fully Consistent With The Policy And Provisions Of Section 5(2)(f) Of The Interstate Commerce Act.

As the preceding legislative history shows, the provisions of Section 5(2)(f) relating to voluntary protection agreements were intended to permit labor and management to arrive at mutually desirable arrangements which might depart from the protection described in the statute. Any notion of a limitation on what labor and management might agree to, based on the protection features contained in the first two sentences of Section 5(2)(f), is clearly contrary to the basic intent and purpose revealed by the legislative history. The Court of Appeals nevertheless applied pre-

cisely such a standard. The court held that the agreement provides the Sandusky Line employees with less protection than they would be afforded under the provisions of the second sentence of Section 5(2)(f) and is, consequently, "contrary to the policy of the Act" (A. (II) 188-89).

The court's conclusion in this regard was based on the view that the second sentence of Section 5(2)(f) required, as a minimum, that the Sandusky Line employees be given full protection against any reductions in earnings below the employees' total earnings on the entire Toledo Division prior to the merger. The court reasoned that, since the agreement only protected earnings on the Sandusky Line, it provided less protection than was required by the second sentence of Section 5(2)(f). In reaching this conclusion, the court ignored the fact that Section 5(2)(f) provides a four-year limitation on compensation protection, ignored the major additional benefits with respect to matters other than compensation which the employees were entitled to under the agreement, and ignored the fact that the compensation protection afforded by the second sentence of Section 5(2)(f) extends only to reductions in earnings directly attributable to the merger.

The second sentence of Section 5(2)(f) provides only that the Commission shall protect an employee's compensation from adverse effects attributable to the merger for a period of four years from the date of the merger or for the number of years during which the employee has been employed by the carrier prior to the merger, whichever is less. Several points should be borne in mind with regard to this protection. First, in order to obtain any benefits under such protection, an employee has the burden of proving that any loss of compensation which he suffers is a result of the merger and not some other factor. Second, the protection does not guarantee the employee continued employment but only that he will not suffer a loss in com-

pensation for a fixed period of time. Third, the protection flows only from the carrier by which the employee was employed prior to the transaction. Fourth, there is no guarantee that the employee will be subject to the same working conditions after the transaction as before. Fifth, the protection continues for a period of four years or less.

These features may be compared with the protection afforded by the agreements. First, under these agreements, all employees of the Sandusky Line are deemed adversely affected by the transaction with no necessity of proof of this fact. Second, the employee is guaranteed continued *employment* for his entire working life. Third, the employee has the opportunity to become employed by the Norfolk and Western and thereby to continue his residence in Sandusky, Ohio if he so wishes. Fourth, the Norfolk and Western agrees to take over and assume all contracts, schedules and agreements having application on said Sandusky Line between the Pennsylvania Railroad and the employee's labor organizations concerning rates of pay, rules and working conditions with certain minor exceptions. Fifth, both the employment and compensation protection of the agreements continue for the working lifetime of the employee.

Even when the compensation protection afforded by the agreements and protection of all earnings over the Toledo Division during the four year statutory period are compared, without considering other elements of protection, the protection provided by the agreements is preferable. While the formula fixed by the agreements protects less earnings during the four years immediately following the merger, it continues to offer protection beyond the four year statutory period for the full working life of the employee.

The Court of Appeals' view that all Sandusky Line employees would, under Section 5(2)(f), be entitled to compensation for any loss of earnings *attributable to their inability to work on the entire Toledo Division* was based on its conclusion that: "The merger split their seniority district and, as a result, they were unable to receive the working time previously obtainable before the merger—no matter which option they chose" (A. (II) 189). This statement demonstrates a fundamental misunderstanding of the effect of the transaction and the significance of the individual employee's choice to either elect employment with the N & W or remain with the Pennsylvania. Since the work previously available on the Toledo Division was not reduced by its severance into two sections and since the severance did not increase the number of employees, splitting the seniority district would not have reduced earning opportunities if accompanied by an appropriate allocation of employees to each segment of the severed district. For the purpose of achieving an appropriate balance, the parties to the agreements limited protection for those electing N & W employment to their Sandusky Line earnings, expecting that this limitation would make the N & W employment option attractive only for those with full-time earnings on the Sandusky Line (Noell Dep., pp. 9-13). Despite this restriction, some employees with limited Sandusky Line earnings did elect employment with the N & W, apparently anticipating an increase in business over the Sandusky Line under N & W ownership (Noell Dep., p. 18). This decision to accept employment with the N & W despite the fact that their earnings on the Sandusky Line prior to the merger were very limited was the major cause of these employees' loss of earnings. Such employees were not entitled to any protection under any provisions of Section 5(2)(f) since their reduced earnings were attributable to their

election to become N & W employees and were not caused by the merger.[8]

The district court had reached the same conclusion as the Court of Appeals with regard to the necessity for the protection of all losses in earnings of Sandusky Line employees *attributable to their inability to work on the other portions of the Toledo Division.* The district court's conclusion was based on an analogy between the Sandusky Line transaction and a hypothetical transaction in which Pennsylvania was merged into the N & W and all the lines of the Toledo Division, with the exception of the Sandusky Line, were subsequently abandoned. The court reasoned that in the hypothetical transaction the employees' benefits would be calculated on the basis of their entire earnings on the Toledo Division and that, consequently, Section 5(2)(f) must require the same protection in the instant situation (A. (I) 51-52).

The court's analogy is clearly improper, however, since the hypothetical involves a situation where the transaction itself deprives all employees of their right to work on the portions of the Toledo Division other than the Sandusky Line. Thus the hypothetical transaction itself would inevitably create a condition of underemployment by substantially reducing the available work without decreasing the number of employees available to perform the work.

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[8] This is vividly illustrated by the situation regarding respondent Nemitz. During the 12 months prior to merger, respondent Nemitz had total earnings of $7,000 (A. (I) 11). Of this total, only $2,346 represented earnings on the Sandusky Line, the remaining $4,654 having accrued from service on other portions of the Toledo Division (A. (I) 11; Respondents' Brief In Opposition, pp. 3-4). Of the 96 trainmen who elected employment with the N & W, however, 45 worked exclusively on the Sandusky District in the 12 months prior to merger and thus had protection for all of their earnings (Def. Ex. 2, Noell Dep.).

The instant transaction, in and of itself, did not cause a situation of underemployment. To the extent underemployment took place, it was the direct consequence of the respondents' own election to become N & W employees despite their limited previous earnings on the Sandusky Line.

In negotiating the 1962 agreement the parties attempted to maintain full employment opportunities for all Toledo Division employees and to provide certain of these employees with the opportunity to continue to work on the Sandusky Line. Neither of these possibilities were available to the employees under the protection traditionally prescribed by the Commission pursuant to the second sentence of Section 5(2)(f), but were achievable through the flexibility afforded to the parties by the last sentence of that section. The lower court's failure to comprehend the factors which led the parties to reach this agreement illustrates the dangers inherent in the court's assumption of authority to supervise the collective bargaining process. Moreover, the fact that the court's holding would outlaw future agreements which, like the 1962 agreement, deviate from traditional protection in order to meet the needs of special situations, demonstrates the undesirability of this holding.

In any event, a discussion of whether the agreements are consistent with the protective requirements of Section 5(2)(f) misses the point. The possibility of providing protection through voluntary agreement is an alternative to Commission prescription of protection in accordance with those requirements. Respondents' authorized representatives chose that alternative. Respondents, by this action, do not attack this decision to forego Commission prescription in favor of negotiation and voluntary agreements, nor do they seek the type of protection the Commission customarily prescribes in such a situation in the absence

of agreement.[9] Instead, they seek to retain the benefits obtained by their representative through negotiation and voluntary agreement, while using the protection requirements applicable to the Commission to shield them from the effect of the portions of the agreements with which they are not pleased. Respondents' position in this regard, adopted by the courts below, that they are entitled, under the Interstate Commerce Act, to the best of both worlds—i.e., employment with the N & W, lifetime financial benefits and lifetime employment security plus a guarantee of full protection of all previous earnings—is clearly erroneous.

B. Implementing Agreement 1-A Does Not "Abridge" Any Rights Previously Vested In Respondents And Is In Any Event An Agreement Within The Purview Of The Last Sentence of Section 5(2)(f) Of The Interstate Commerce Act.

The decisions below with respect to Implementing Agreement 1-A are clearly based on the premise that the 1962 agreement protected earnings derived from the entire Toledo Division and that Implementing Agreement 1-A "abrogated" this guarantee (A. (II) 188-89). Thus, the Court of Appeals stated:

> "We construe the 1962 agreement as incorporated in the I.C.C. order as meaning that the appellees were to

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[9] This type of protection is illustrated by the Commission's decision in *Cadillac & Lake City Ry. Co. Acquisition and Operation*, 320 ICC 617 (1964). In that case, the Cadillac & Lake City Ry. Co. acquired a line of railroad which had previously been operated by the Pennsylvania Railroad between Falmouth and Missaukee, Michigan. There was no voluntary agreement for employee protection and the Commission prescribed the customary protective conditions for the affected Pennsylvania employees. Under these conditions, the affected employees remained employed by the Pennsylvania with earnings protection for a period of four years from the date of any adverse effect. The conditions also provide reimbursement for some of the costs of moving for employees required to work at a different location as a result of the sale.

> suffer no loss of compensation based upon their inability to work throughout the entire Toledo Division —not limited to their earnings on the Sandusky Line alone." (A. (II) 181)

However, the parties to the 1962 agreement, who negotiated Implementing Agreement 1-A, considered the latter agreement to be wholly consistent with, and in fact required by, the provisions of the 1962 agreement. This is fully and indisputably established by the record of proceedings before the BRT's Grand Lodge Board of Appeals in connection with respondents' efforts to convince the Brotherhood that Implementing Agreement 1-A accorded them less protection than the provisions of the 1962 agreement.

In the proceedings before the Board, respondents were represented by T. E. Fitz, Local Chairman of the BRT Lodge comprised of Sandusky Line employees, and one of the respondents here. The Board posed the issues presented by quoting first from a letter, written by Fitz. In this letter, Fitz asserted that J. F. McNeel, General Chairman of the BRT, acted improperly in agreeing to Implementing Agreement 1-A and a concurrent Letter of Understanding because both documents limit the protection of Sandusky Line employees to their earnings on that line in the twelve months immediately prior to the merger. Fitz also acknowledged in this letter that N & W had taken this same position in a communication to the representatives of the Brotherhood at the time that the 1962 agreement was signed. In outlining his disagreement with the N & W and J. F. McNeel, Fitz stated (A. (I) 116-17):

> "The management of the N & W, however, contend they are only obligated to protect these men for monies earned performing service on the 111 miles of road between Columbus and Sandusky and the Sandusky yards, thereby dividing their earnings for the purpose of establishing a test period. They also contend they

are only required to use earnings from October, 1963, until October, 1964. I have, to the best of my ability, dissected word for word Section 3 of Finance Docket 21512 (Exhibit B) and I fail to see what the carrier is using to support their position. Brother McNeel uses as support of his position a letter from Mr. H. C. Wyatt, Senior Vice President, N & W Railroad, addressed to Brother F. C. Montgomery, Vice President, Brotherhood of Railroad Trainmen, under date of April 23, 1962 (Exhibit C) which states on page 3, Title VIII, Section 3, second paragraph, '* * * The protection afforded these employees of the PRR would be in direct ratio to service on the district in the previous 12 months * * *' It is Brother McNeel's contention, because there was no exception to this language, he was forced to accept the N & W's position, holding only earnings paid these trainmen in the previous 12 months on the Sandusky Branch could be used in establishing a test period, this in a letter addressed to me under date of January 24, 1966 (Exhibit D)."

The Board of Appeals also quoted a letter to Fitz from McNeel explaining why McNeel agreed to the formula for computing benefits outlined in Implementing Agreement 1-A. That letter from McNeel states (A. (I) 129-30):

"In your second letter, you dwell on the language of an Agreement known as Implementing Agreement 1-A. You took exception to the fact that Paragraph B of this Agreement stipulates that the so-called 'test period' was arrived by taking the total earnings of the now Sandusky District men that were actually earned by them while employed on the Sandusky Branch of the P.R.R. Company in the twelve prior months to October 16, 1964, which I feel is proper under Section 3 of the January 10, 1962 Agreement. For support of my position, I have repeatedly quoted the language of this section of the January 10, 1962, Agreement as well as the language of the Memorandum of Understanding attached to and made a part of the January 10, 1962, Agreement. For further support, there is a letter dated April 23, 1962, from Mr. H. C. Wyatt to Vice President

> F. C. Montgomery wherein Mr. Wyatt clearly spells out the test period will be arrived at as it was in our Agreement of October 25, 1965. Mr. Wyatt's language [was] unchallenged or refuted in any way, . . .
>
> "Therefore, in answer to both of your letters of January 13, 1966, I must again assert that my interpretation of Section 3 of the January 10, 1962, Agreement has been arrived at by long study and by advice from the men who handled this matter before I was required to come in contact with it."

Thus, McNeel, who negotiated Implementing Agreement 1-A as the representative of respondents and other employees, clearly stated his view that that agreement fixing the protective benefits based on Sandusky Line earnings in the previous twelve months was required by Section 3 of the 1962 agreement.

The Board of Appeals, after outlining Fitz' position, next outlined the opposing position by quoting a letter submitted by McNeel. This letter states (A. (I) 134, 136-37):

> "Your attention is directed to Section 3 of this Agreement which refers to the trainmen of the Sandusky District of the Scioto Division of the Norfolk and Western Railway Company and reads as follows:
>
> [Quotation of Section 3 omitted]
>
> "From the language in this Agreement, it can be clearly adduced that the trainmen who formerly worked on the Pennsylvania Railroad and exercised their option to transfer to the Norfolk and Western Railway Company are entitled, for the purpose of determining the amount of 'Certified Test Period Earnings,' only to the amount of monies earned on the Sandusky District during the twelve (12) months immediately preceding the effective date of the merger . . ."

Thus, the issues were clearly framed. Fitz took the position that the Letter of Understanding and Implementing

Agreement 1-A were improper because they provided benefits based on Sandusky Line earnings during the previous twelve months and this was contrary to the January 10, 1962 Agreement. McNeel's position, and that previously expressed by the N & W, was that the Letter of Understanding and Implementing Agreement 1-A were proper because they were consistent with the January 10, 1962 Agreement since all the agreements provided for protection limited to Sandusky Line earnings during the twelve months immediately preceding the merger.

The Board of Appeals resolved this conflict with the following unequivocal language (A. (I) 147-50):

> "The Board has carefully considered all the documentary evidence submitted to us for our study as well as the transcript of the oral testimony taken at the time of hearing and we are of the following opinion:
>
> * * *
>
> "Section 3 of title VIII of the 'Agreement Effective January 10, 1962, and Attached Memoranda of Understanding For Protection of Employees in Event of Approval of Merger' * * * provides for employment or compensation to protected or adversely affected employees but with certain strings attached, to wit: '* * * Norfolk and Western shall not be required to provide employment or compensation to any such employe during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid for to the Sandusky Line employe * * *.'
>
> * * * *
>
> "The appellant, in his appeal, makes the following plea: 'We are also petitioning the Board of Appeals to submit this entire matter, (to) arbitration . . .'
>
> *"Section 1(d) provides for arbitration only in the event the carrier or any of the signatory organizations are at odds or disagreement. In the instant case, there is no such disagreement between our Brotherhood and Norfolk and Western. The only disagreement we can*

see in this case is that of the appellant with the efforts of the representatives of the Brotherhood in their implementing and complementing the already existing guide lines established in [the 1962 agreement].

* * *

"We are convinced that no valid reasons have been put forth that would warrant the setting aside of either the Implementing Agreement '1-A' or the Letter of Understanding of October 25, 1965, under appeal.

"We believe that General Chairman J. F. McNeel's actions in the instant case are right, proper and just and in conformity with the controlling [provisions of the 1962 agreement]."

Thus, the representatives of the employees who negotiated the agreements in question were clearly of the view that Implementing Agreement 1-A was in conformity with the 1962 agreement and was necessary to implement and effectuate the general protection standards of that agreement. In view of this controlling evidence of the purpose and intent of the parties to both agreements, the contrary interpretation by the courts below is wholly insupportable. It follows, therefore, that Implementing Agreement 1-A did not abridge any rights previously vested in respondents by the 1962 agreement and, accordingly, disposes of respondents' claims in this proceeding.

In any event, the conclusion of the courts below that an agreement subsequent to Commission approval of a merger is invalid unless it is totally consistent with any previous order entered by the Commission for the protection of the covered employees finds no basis in the language of Section 5(2)(f). The last sentence of that Section, which is the only provision dealing with voluntary agreements, provides as follows:

"Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests

> of said employees may hereafter be entered by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

It contains no limitations of any kind on the type of agreement which may be reached by the carriers and the employees' representatives. Certainly, it does not state or imply that the agreement must be consistent with either previous Commission orders or with the requirements of the second sentence of Section 5(2)(f). Indeed, it provides that nothing in the Act shall operate to prohibit the making of such an agreement. Despite this language, the court concluded that the Interstate Commerce Act and the Commission order issued pursuant to it prohibited and invalidated Implementing Agreement 1-A. Implementing Agreement 1-A is "an agreement pertaining to the protection of the interest of said employees" and it was entered into "by . . . any carrier. . . . and the duly authorized representative . . . of its . . . employees" after the date of enactment of the Section and also after the Commission order approving the merger. By the terms of the Act, it is, therefore, valid and binding upon the parties.

The proper interpretation of the terms of Section 5(2)(f) is confirmed by the legislative history of that Section which has already been discussed (*supra,* pp. 25-34). Without repeating that discussion, two significant points should be made. First, that history firmly established that the right of carriers and unions to resolve disputes over labor protective benefits by voluntary agreement was viewed as an *alternative* to Commission prescription of protective conditions. Certainly, if a voluntary agreement is required to be consistent with Commission prescribed terms, it would not be a meaningful alternative to such a prescription. Thus, the argument that agreements made pursuant to the last sentence of 5(2)(f) are in some way limited by what

the Commission has prescribed for employee protection is inconsistent with the legislative history. Second, the legislative history establishes that the second sentence of 5(2)(f) was intended to serve as a limitation on *the Commission's* authority to exercise discretion in requiring "a fair and equitable" plan for employee protection under the first sentence. This was done because of labor's fear that the *Commission* might prescribe inadequate protection for employees. It was not included, as the decisions below suggest, because of union fears that voluntary agreements made by the unions themselves would not adequately protect employees.

Unless the lower courts' interpretation of Section 5(2)(f) is rejected, the federal courts will become forums in which any dissident union member, who is unhappy with the protective benefits his union has obtained for him, can seek to obtain preferred treatment by litigating questions involving the proper interpretation of the various documents which govern such protection. This would inevitably require federal courts to interpret agreements between labor unions and employers as an initial matter and without the benefit of prior consideration by established administrative agencies or processes. Such an approach is completely inconsistent with the firmly-established Congressional policy to leave the interpretation of such agreements to expert administrative bodies.

III. UNDER THE CONTROLLING DECISIONS OF THIS COURT, BRT'S GOOD FAITH ABANDONMENT OF RESPONDENTS' GRIEVANCE SHORT OF ARBITRATION PRECLUDES MAINTENANCE OF THIS ACTION.

Section 1(d) of the January 10, 1962 Agreement provides that in the event of a dispute over the interpretation or application of that agreement which cannot be resolved by

the parties within 30 days, either the BRT or the N & W "may" submit the controversy to arbitration. This provision was also incorporated by reference in Implementing Agreement 1-A. Such a dispute arose when the respondents insisted that the protective benefits which they were receiving from the N & W were less than the benefits to which they were entitled under the January 10, 1962 Agreement. Respondents urged their position upon the BRT and insisted that the BRT pursue this interpretive dispute with the N & W to the ultimate step of arbitration. Pursuant to established union procedures, the BRT's highest appellate body, its National Board of Appeals, granted respondents a full hearing, determined that their position was without merit, and refused to invoke the arbitration provisions of the agreement (A. (I) 148-50). Respondents have never suggested that this decision was made in bad faith or constituted wrongful conduct on the part of the BRT. Under the controlling decisions of this Court, the necessary conclusion from these facts is that respondents are precluded from maintaining this subsequent lawsuit with regard to the same dispute.

The Court of Appeals concluded that because the arbitration clause was permissive in the sense that it did not require arbitration but only permitted either party to submit a dispute to arbitration, dissident employees could file a lawsuit with regard to any dispute which was not actually submitted to arbitration. The Court of Appeals acknowledged that the arbitration clause was mandatory as between the BRT and the N & W in that either party could require the other to settle any dispute through arbitration but, nevertheless, held that dissident employees could ignore this mandatory arbitration process when their claim was rejected by the union short of arbitration (A. (II) 191). This holding means that any grievance procedure which permits the union to abandon an employee's

claim short of final resolution would have the effect of allowing the employee to litigate the abandoned claim in court.

The court below also held that it was unnecessary for the employees to exhaust the arbitration procedure since "it would have been a futile gesture for the appellees to have attempted to proceed further with . . . arbitration" (A. (II) 192). Presumably, the court's holding in this regard was based on the fact that only the union could submit the dispute to arbitration and the union had refused to do so. By a species of circular reasoning, the Court of Appeals thus resolved the question of *whether* an employee should be bound by his union's good faith refusal to exhaust available grievance procedures by concluding that the employee was not bound *because* the union had refused to exhaust the grievance procedures on the ground that the employee's argument was untenable.

Although the court below has cast its conclusions in terms of construing the arbitration clause and in terms of excusing exhaustion because of futility, it has held, in effect, that the union's good faith refusal to process respondents' claim through the grievance procedure which it controls precludes the N & W from raising the defense of failure to exhaust administrative remedies. This result is directly contrary to this Court's resolution of the issue in *Republic Steel* v. *Maddox,* 379 U.S. 650 (1965), and *Vaca* v. *Sipes,* 386 U.S. 171 (1967).

In *Maddox,* which involved an arbitration clause providing that grievances may be submitted to arbitration by either the union or the employer, this Court held that an employee could not sue his employer for breach of the collective bargaining agreement without first affording the union an opportunity to handle the grievance on his behalf. A contrary result, this Court concluded, would "deprive

employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances and 'would inevitably exert a disruptive influence upon both negotiation and administration of collective agreements'" (379 U.S. at 653).

This Court in *Maddox* did not specifically deal with the consequences of union refusal to press a grievance to final resolution, stating that "differences may arise as to the forms of redress then available" (379 U.S. at 652). Subsequently, in *Vaca* v. *Sipes,* this Court considered that issue in detail and concluded that in such a situation an employee was precluded from bringing a judicial action against either the union or the employer in the absence of a showing that the union's refusal to take the matter to arbitration was arbitrary, discriminatory or in bad faith. Discussing the relative interests of the union, the employee and the employer, this Court stated (386 U.S. at 191):

> "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interests of the union as statutory agent and as co-author of the bargaining

agreement in representing the employees in the enforcement of that agreement."

Based upon these policy considerations, this Court held that where an employee's union has failed to exhaust the administrative remedies available to it, an employee may sue his employer for breach of contract only if (386 U.S. at 186):

> ". . . the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance."

Vaca v. *Sipes* thus established the rule that an employee is bound by the good faith failure of his union to exhaust the arbitration provisions of a collective bargaining agreement. The decision of the Court of Appeals in this case clearly violates this rule since it permits an employee to sue his employer when the employee's collective bargaining representative has failed to process the employee's claim to final resolution under the grievance procedure because of a good faith determination by the union that the employee's claim was without merit.[10]

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[10] The Court of Appeals relied on the decision in *Glover* v. *St. Louis—S.F.R. Co.*, 393 U.S. 324 (1969) to justify its refusal to follow the principles enunciated in *Vaca* v. *Sipes* (A. (II) 192). In *Glover*, Negro union members sued their union and their employer for conspiring to discriminate against them because of race. The Court concluded that where "the bargaining representatives of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race" the plaintiffs "should [not] be required to submit their controversy to 'a group which is in large part chosen by the [defendants] against whom their real complaint is made' ". That holding has no conceivable application to the present controversy. Here there is no allegation of discrimination or wrongful conduct by the union; the complaining employees in this case did resort to the grievance procedure and the union in good faith determined that their claim was without merit.

In the present case, the determination by respondents' collective bargaining representative that respondents' claims were without merit and did not warrant submission to arbitration was clearly a reasonable and informed decision. Respondents' collective bargaining representative had negotiated agreements with the N & W which clearly fixed respondents' protective benefits. Moreover, the benefits available to the respondents under the agreements thus made were substantial and preferable in many respects to the benefits which might have been prescribed by the Commission in the absence of such agreements (as discussed at pp. 41-45, *supra*). It was pursuant to the option contained in these agreements that respondents had elected to sever their employment relationship with the Pennsylvania and to become employees of the N & W, after being fully advised of the applicable protective benefits. In these circumstances, the determination of respondents' union that "no valid reasons have been put forth that would warrant the setting aside of either the Implementing Agreement 1-A or the Letter of Understanding of October 25, 1965" (A. (I) 150) is binding on respondents and clearly precludes this litigation.

The holding of the Court of Appeals in this case also conflicts with the law established in other circuits where the Courts of Appeal have followed *Vaca* v. *Sipes* in identical situations. In *De Arroyo* v. *Sindicata De Trabajadores Packing*, AFL-CIO, 425 F.2d 281, 284-85 and f.n. 3 (1st Cir. 1970), cert. den. 400 U.S. 877 (1970), the Court of Appeals for the First Circuit considered the question of whether employees could sue their employer for breach of contract despite their union's refusal to exhaust the grievance procedure of the contract which gave the union control of that procedure and permitted it to abandon a grievance without exhausting the procedure. The Court held that an employee

could not properly sue his employer in the face of a refusal of the union to exhaust the grievance procedure where the refusal was not arbitrary. The Court of Appeals for the Fifth Circuit reached the same result in *Boone* v. *Armstrong Cork Company*, 384 F.2d 285, 291-92 (5th Cir. 1967). These governing decisions in the First and Fifth Circuits are in direct conflict with the decision below.

The decision of the court below is also contrary to several unappealed District Court decisions: *O'Sullivan* v. *Getty Oil Company*, 296 F. Supp. 272 (D. Mass. 1969); *Rivera* v. *NMU Pension & Welfare & Vacation Plan*, 288 F. Supp. 874 (E.D. La. 1968); and *Williams* v. *Wheeling Steel Corporation*, 266 F. Supp. 651 (N.D. W.Va. 1967).

Although the decisions delineating the *Vaca* v. *Sipes* doctrine, which the Court of Appeals refused to follow, involve suits under the Labor Management Relations Act, these decisions are equally applicable to a situation in which an arbitration provision has been voluntarily incorporated in a Railway Labor Agreement. This Court has recognized the applicability of the principles of *Vaca* v. *Sipes* to railway labor agreements arising out of mergers. *Czosek* v. *O'Mara*, 397 U.S. 25 (1970). The desirability of maintaining a uniform, exclusive and orderly system for administering collective bargaining agreements and the need to preserve the union's role in and control over that process are equally compelling. Indeed, in a merger situation which places unusual stress on labor relations, these goals are of even greater importance. The Court of Appeals did not refuse to apply *Vaca* v. *Sipes* because this case involves a railway merger but simply misinterpreted its holding.

The court below also sought to lift the bar to this litigation arising from respondents' failure to exhaust administrative procedures by holding that the arbitration clause,

which provided that either party "may" refer disputes to arbitration, "was permissive until such time as the union or appellant invoked arbitration" (A. (II) 191). In reaching this conclusion, the lower court recognized that its holding was in conflict with "the conclusion reached by the Eighth Circuit [*Bonnot* v. *Congress of Independent Unions, Local #14,* 331 F.2d 355] that the 'may' clause is absolutely mandatory, in the sense of requiring either arbitration or abandonment of the aggrieved party's claim" (A. (II) 191).

In *Bonnot,* the arbitration clause provided that "either party may request arbitration" in the event of disagreement as to the interpretation or application of the contract. Mr. Justice Blackmun correctly interpreted this type of agreement, stating (331 F.2d at 359):

> "The obvious purpose of the 'may' language is to give an aggrieved party the choice between arbitration and abandonment of its claim."[11]

The contrary holding of the court below in the present case means that dissident employees may institute judicial proceedings with respect to any dispute which has not been submitted to arbitration. If a union rejects a frivolous claim short of arbitration, the employee involved is then free, under the decisions below, to ignore the arbitration process and to proceed in court.

In such a situation, the employer could preserve the applicability of the grievance procedures only by engaging

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[11] Other courts have considered the question and reached identical conclusions: *Arnold* v. *L&N R. Co.,* 180 F. Supp. 429, 436 (M.D. Tenn. 1960); *Thompson* v. *St. Louis—San Francisco Ry. Co.,* 113 F.Supp. 900, 902-03 (S.D. Ala. 1953); and *Parsons* v. *Norfolk and Western Ry. Co.,* 310 F.Supp. 1197 (S.D. W.Va. 1970), Aff. ____ F.2d ____ (4th Cir., 1971) involving the same arbitration clause as is involved here.

in the morally questionable and entirely wasteful activity of itself processing the controversy through the grievance procedures against a union that has already gone on record as agreeing with the employer's interpretation of the agreement. No arbitration provision should be given an interpretation so disruptive of the orderly administration of the agreement and so obviously harmful to the proper function and prestige of the union unless the agreement clearly and unambiguously requires it. The mere fact that the agreement provides that either the union or management "may" submit a dispute to arbitration certainly does not require such a result. As this Court stated in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 658-59 (1965):

> "Use of the permissive 'may' does not of itself reveal a clear understanding between the contracting parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. Any doubts must be resolved against such an interpretation."

Mr. Justice Blackmun properly interpreted this type of agreement in the *Bonnot* case and the holding of that case should be established by this Court as the proper one. It follows, therefore, that the decisions below must be reversed with directions to dismiss because of respondents' failure to exhaust administrative remedies.[12]

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[12] If the arbitration provisions of the 1962 agreement are considered inappropriate for any reason, the dispute as to the protective benefits payable to respondents would, nevertheless, be subject to the processes of the National Railroad Adjustment Board. *O'Mara* v. *Erie Lackawanna Railroad Company,* 407 F.2d 674 (2nd Cir., 1969), affirmed *sub. nom. Czosek* v. *O'Mara* 397 U.S. 25 (1970).

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit Court of Appeals should be reversed with directions to dismiss for lack of jurisdiction and for failure to exhaust administrative remedies.

Respectfully submitted,

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